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No. 87-2135

IN THE

Supreme Court of the United States

October Term, 1987

ISLAMIC REPUBLIC OF IRAN BROADCASTING,
Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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I. IRIB "at the time the ruling . . . . [was] made . . . [made] known to the court . . . [its] objection to the actions of the court and the grounds therefore" in accordance with Rule 46, F.R.C.P.

The discussion among trial counsel and the District Court concerning Bourguet's testimony about governmentally-approved confiscations is recorded in over twenty pages of transcript. The District Court ruled no less than four times (App. pp. 171, 174, 183, 187), over IRIB's objection, that Bourguet could testify about such confiscations. The basis of each objection was that the jury might conclude from Bour-

guet's testimony that the government could have confiscated property from a government agency, to wit, the Stradivarius from IRIB. App. 1268-69, 1271-73, 1274-76, 1282-83. Behroozian argued that he was entitled to show the possible ways in which the Stradivarius could have been *properly* transferred from IRIB to the Foundation (from which Behroozian testified he bought the Stradivarius). App. 1269-70, 72-73, 81.

During the third colloquy, counsel argued:

> So if you took something from one of the agencies in the revolution, nobody knowns where it's from. So, therefore, Khomeini says, "Give it back and we'll put it into the public treasury." Once that happens and once Khomeini is the leader of the entire government and does that, *there is no way that somebody who buys it from Khomeini's foundation has any reason to question the title,* and there's no reason for NIRT [IRIB's predecessor] to come along and say, "We were the number one entity. Nobody could take our property away. It could not be confiscated." It was. *It was Khomeini's policy in 1979. There was no higher authority than him.*
>
> But this is just my argument. Mr. Bourguet was there. Mr. Bourguet represented Khomeini. [App. p. 1281, emphasis supplied]

The court then ruled for a third time:

> The Court: Well, let him testify to it. I don't want to hear you and then hear him. Let him testify to that. *If that's a fact,* let him testify to that. [App. pp. 1281-1282, emphasis supplied]

This colloquy and the court's ruling make clear that IRIB gave the grounds for its objection, to wit, that the jury could conclude that there was a legal confiscation. Behroozian stated

that that was precisely what he was entitled to show. The District Court agreed with Behroozian because testimony as to a policy of legal confiscation in the court's view raised a factual issue that the jury was entitled to decide. If we have persuaded this Court that testimony as to the fact of the existence of foreign law is an issue for the court to decide pursuant to Rule 44.1, F.R.C.P., then this ruling was error. But, however this Court should decide that issue, it is entirely clear that IRIB made known to the District Court the grounds for its objection.[1]

It is true, as Behroozian argues (Brief p. 5), that IRIB did not object further after Bourguet began to testify, but it would not have been proper, after four rebuffs, to do so. The testimony Bourguet gave was within the rationale offered by counsel for its admissibility. The testimony clearly tended to show that IRIB property might have been legally confiscated, precisely the basis for IRIB's objection.[2] IRIB should not be required to have objected a fifth time to preserve its objection.

It is also true as Behroozian argues (Brief p. 5), that IRIB itself finally asked Bourguet if he had any knowledge of confiscation of government property.[3] It may also be true that

[1]Respondents' brief (pp. 3-4) may be read to suggest that IRIB was required to refer specifically to Rule 44.1, F.R.C.P., in its objection. No citation of authority, however, is provided for this proposition, and we know of none. Behroozian also argued to the Circuit Court that IRIB had not objected to this testimony. Respondent's Circuit Court Brief, pp. 39-41. Although finding in Behroozian's favor, the court did not rule on this issue.

[2]Respondents' proposed jury instruction XV provided that if Behroozian proved he had purchased the Stradivarius from the Foundation, even if IRIB had shown it was stolen, the jury was required to find for Behroozian by reason of the governmental policy of confiscation and transfer to the Foundation. App.724.

[3]His precise answer was he did not know one way or the other. App. 1320.

Bourguet was a credible witness (Brief p. 5). These circumstances, however, cut against Behroozian's argument. A party does not waive an objection to testimony because it was credible or by trying to rebut it after it has been admitted.

Nor does it help Behroozian's position that IRIB itself erred in submitting legal issues to the jury (Brief p. 4, n. 4). That simply shows that there was another violation of Rule 44.1, F.R.C.P. at the trial. Neither the District Court nor trial counsel appear to have known that testimony as to the existence of foreign law is an issue for the court not the jury. The Circuit Court's decision will importantly add to this misperception among bench and bar because it is the only decision from a court in the United States addressing this issue.

II. The District Court was not relieved of its duty to instruct the jurors, fully and correctly, on the applicable law because IRIB requested an instruction which did not reach the controlling issues.

Dr. Safai, a law professor at Tehran University, testified through a sworn affidavit that the Foundation could not legally transfer the Stradivarius (1) because the ownership of such property was beyond the object and purpose of the Foundtion, (2) because IRIB could not sell the Stradivarius to the Foundation except in accordance with applicable regulations, and (3) because IRIB had no authority to gift the Stradivarius to the Foundation. App. 377-401. Dr. Vafai, a member of the Iranian bar and an Iranian legal specialist at the Library of Congress, in another sworn affidavit, agreed with Dr. Safai. App. 748-749.[4]

[4]Respondents' Brief, p. 6, n. 5, takes issue with IRIB's characterization of affidavit evidence as testimony. A statement is generally considered testimony if it is sworn even though it is written rather than spoken in

Because under Iranian law the Foundation could transfer good title to Behroozian only if it had good title, the circumstances under which the Foundation acquired possession of the Stradivarius presented the crucial factual and legal issues in the case. The theory suggested by Behroozian's evidence was a legal confiscation followed by a transfer to the Foundation.[5] If the jury believed there had been a legal confiscation, Dr. Safai's opinion that IRIB could not gift the Stradivarius to the Foundation or transfer it except in accordance with the applicable regulations would present no obstacle to a jury verdict for Behroozian. Dr. Safai's first point, however, that the possession of a Stradivarious was beyond the object and purpose of the Foundation would still be an obstacle. Putting aside Dr. Safai's first point, however, it is possible that the jury found that IRIB's evidence that it had not transferred the Stradivarius in accordance with the regulations was insufficient to carry its burden of proof.

None of the foregoing problems were addressed in the instructions in the case. The instruction given was correct as far as it went, but it did not address the "controlling issues" in the case. Accordingly, contrary to respondents' brief (p. 8) and contrary to the Circuit Court's opinion, there was "plain error." 9 Wright and Miller, *Federal Practice and Procedure*, Civil §2556, at 654-655, footnotes omitted.

Respondents' Brief takes no issue with IRIB's assertion that the District Court's refusal to apply the "plain error" rule

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open court (Black's Law Dictionary, 5th Ed. 1979, "Testimony"), so the characterization was not misleading. It may be that Drs. Safai and Vafai, as respondents claim, addressed the wrong regulations, but on that hypothesis, IRIB's Khodapanahi addressed the correct ones. It is true that IRIB's experts were opposed with a variety of legal materials, but respondents proffered no expert to explain them. The District Court never indicated that he disagreed with Dr. Safai's and Dr. Vafai's conclusions.

[5]See fn. 2.

where no objection has been made as required by Rule 51, F.R.C.P., is in conflict with decisions of the Second, Third, Fifth, and Eleventh Circuits. It appears, furthermore, that the Ninth Circuit exceeds the District of Columbia Circuit in its hostility to the "plain error" rule and flatly rejects it. *Herrington* v. *Sonoma County*, 834 F.2d 1488, 1500, n. 12 (9th Cir. 1987); *Brett* v. *Hotel, Etc. Emp. & Bartenders Local 879*, 828 F.2d 1409, 1414, n. 7 (9th Cir. 1987). Accordingly, there is substantial disagreement among the Circuits on this issue.

Finally, this Court's opinion in *Newport* v. *Facts Concerts, Inc.*, 453 US. 247 (1981), which held that the City of Newport which had failed to object to a charge authorizing a jury to award punitive damages was not foreclosed from appellate review, supports IRIB's position here. Among the reasons for allowing plenary review in that case were the novelty of the issues, their importance, and the likelihood of the recurrence. The same circumstances obtain here. The Circuit Court's decision here holding that a jury finding that there was an "absence of law" was not inconsistent with Rule 44.1, F.R.C.P. is the leading case on this issue. Because of the United States' increasing involvement with unstable foreign states, this issue is important and likely to recur.

Respectfully submitted,

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